Workers Compensation and Injury Management Bill 2021 (Consultation Draft)

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	About Slater and Gordon Slater and Gordon was founded in Australia in 1935. The company has grown from quite humble beginnings servicing the needs of unions and working people. We have built a powerful reputation throughout our history as a law firm that fights to achieve the best outcomes for our clients, while reducing the stress they go through to obtain their compensation. From the many landmark legal cases we have won to the introduction of innovations such as No Win - No Fee, we have been determined to ensure that more Australians are able to access affordable legal services, no matter where they are. The firm provides specialist legal and complementary services in a broad range of areas, including workers compensation, asbestos litigation, motor vehicle accident claims, public liability claims and medical negligence claims. Slater and Gordon has offices in Perth and across Australia. More information about us is available on our website.[1] **About Slater and Gordon – Asbestos Team** Slater and Gordon has a proud history in fighting for asbestos victims. Slater and Gordon has acted for more than 2500 mesothelioma sufferers during the past 25 years and many others suffering from asbestos related lung cancer and asbestosis. In 1985 Slater and Gordon achieved the first successful verdict for damages at common law for a mesothelioma victim in Australia.[2] In that same year, Slater and Gordon opened an office in Perth to service the needs of victims of the blue asbestos mine in Wittenoom, WA. In 1988, Slater and Gordon successfully represented mesothelioma sufferers and former Wittenoom workers Peter Heys and Stephen Barrow in a WA Supreme Court case against CSR and Midalco[3]. The Heys and Barrow victory legally established CSR's negligence, thus piercing the corporate veil. In 2004, Slater and Gordon represented the ACTU and asbestos victim support groups in the James Hardie enquiry, resulting in the establishment of a $1.5 billion settlement fund in 2006.
Draft Bill clause 5	Slater and Gordon acknowledges that this is the current definition contained in the current Act. However, Slater and Gordon does not support this proposed definition given it is too narrow and excludes unusual sites, localised and *in situ* mesothelioma. For example, in the matter of *Amaca Pty Ltd v Werfel [2020] SASCFC 125*, the 44 yr old Plaintiff had been diagnosed with a rare form of mesothelioma, being mesothelioma of the tunica vaginalis testis.[4] An example of a more modern definition is contained in the Safe Work Australia publication, Deemed Diseases in Australia (August 2015) which defines "*mesothelioma*" as "*Malignant disease of the inside lining of the chest wall (pleura), pericardium and abdomen (peritoneum).*"[5]

[1] https://www.slatergordon.com.au/
[2] *Pilmer v McPhersons Ltd (*Unreported), Gobbo J, Supreme Court of Victoria, September 1985.
[3] *Barrow & Heys v CSR Ltd* (Unreported) Supreme Court of Western Australia, 4 August 1988 (Rowland J).
[4] See *Amaca Pty Ltd v Werfel* [2020] SASCFC 125 at [1].
[5] See Deemed Diseases in Australia, Safe Work Australia, August 2015 pg 58 found at https://www.safeworkaustralia.gov.au/system/files/documents/1702/deemed-diseases.pdf

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	Slater and Gordon has consulted with Associate Professor Sonja Klebe[6], who has proposed the following, more accurate definition: *"**mesothelioma** means a primary malignant neoplasm of the serosal membranes (pleura or the peritoneum as well as pericardium and tunica vaginalis testis)".* The above definition, as proposed by Associate Professor Klebe, will ensure that no mesothelioma sufferer will be unjustly excluded from accessing compensation through the new Act.
Draft Bill sub clauses 6(3) and (4)	Acknowledging the operation of clause 113 of the draft Bill, Slater and Gordon submits that the *"significant degree*" test (in respect to the rebuttable presumption that employment caused the dust disease) should not apply to dust diseases given there is no known safe level of exposure to asbestos below which there is no risk of mesothelioma developing. Slater and Gordon submits that "*material* degree" is the appropriate test to be applied in respect to dust diseases which is in accordance with the common law test[7] and with legislative provisions in other jurisdictions.[8] In *Booth v Amaca Pty Limited & Anor* [2010] NSWDDT 8, a mesothelioma case involving multiple tortfeasors responsible for the Plaintiff's exposure to asbestos, the trial judge found that, "*all exposures to chrysotile asbestos, other than trivial or de minimis exposure, occurring in a latency period of between 25 and 56 years, materially contributes to the cause of mesothelioma*"[9]. This finding was not disturbed by the High Court of Australia on appeal.
Draft Bill clause 19	Slater and Gordon submits that sub clause 19(3) of the draft Bill should not apply if a worker is suffering from a dust disease, given the latent nature of dust diseases. The latency period of mesothelioma (i.e. the period of time between the first exposure to asbestos and diagnosis) can range from 13 to 70 years.[10] A study based on data from people diagnosed with mesothelioma in Western Australia between 1960 and 2008 reported a latency period of between 33 and 44 years.[11] The latency period for silicosis (i.e. the period of time between exposure to respirable crystalline silica and a disease diagnosis) is similarly variable, with a minimal latency period of 4 years. Studies have shown that shorter latency periods, between 4 and 10 years, may be related to a higher level of exposure

[6] MD,PhD,FRCPA,FFSc, Department of Anatomical Pathology, Flinders Medical Centre. Associate Professor Sonja Klebe is a surgical pathologist with a special interest in pulmonary pathology, ocular pathology and molecular aspects of diagnosis.
[7] See *Amaca Pty Ltd v Booth* [2011] HCA 53.
[8] See for example s 4 of the *Return to Work Act 1986 (NT)* and s 3 of the *Seafarers Rehabilitation and Compensation Act 1992* (Cth).
[9] Curtis J at [62].
[10] See for example Frost, G "*The latency period of mesothelioma among a cohort of British asbestos workers (1978–2005)***"** Br J Cancer. 2013 Oct 1; 109(7): 1965–1973. Published online 2013 Aug 29. and Lanphear BP, Buncher CR (1992) *Latent period for malignant mesothelioma of occupational origin*. *J Occup Med* 34: 718–721.
[11] Olsen NJ, Franklin PF, Reid, A, de Klerk NH, Threlfall TJ, Shilkin K et al. 2011. *Increasing incidence of malignant mesothelioma after exposure to asbestos during home maintenance and renovation*. The Medical Journal of Australia 195(5): 271–274.

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	to silica dust (including as a result of tasks carried out in manufacturing workshops and during the installation of countertops at customers' home)[12]. If sub clause 19(3) is enacted, a worker (exposed to dust in Western Australia) would be unjustly denied access to compensation for their dust disease, by virtue of their residency outside Australia.
Draft Bill clause 113	Slater and Gordon strongly supports the presumption of work-relatedness for workers diagnosed with a dust disease (as set out in clause 113 of the draft Bill). With reference to the submissions made above in respect to clause 6 of the draft Bill, subsection (b) of the Note for clause 113 should be amended to "*the employment did not contribute to a material degree".*
Draft Bill clause 114	In respect to clause 114 of the draft Bill, Slater and Gordon understands that it is intended that the "*date on which dust disease injury is suffered*" is either the day the worker becomes totally or partially incapacitated or date of a Dust Disease Medical Panel determination (whichever is the earlier). For clarity, Slater and Gordon submits that sub clause 114(b) of the draft Bill be amended to "*the day that a Dust Disease Medical Panel makes its determination*" (or similar) to reflect this intention.
Draft Bill clause s 115	Slater and Gordon seeks clarification that clause 115 of the draft Bill only applies to accessing compensation and does not in any way limit a worker's ability to go before a Dust Disease Medical Panel for multiple successive dust diseases in order to access their common law entitlements. For example, if a worker goes before a Dust Disease Medical Panel, is determined to be suffering from asbestosis and receives lump sum compensation, they should not be prohibited from going before a Dust Disease Medical Panel in the future, for a determination in respect to mesothelioma to make a common law claim against an employer in respect to the subsequently diagnosed mesothelioma (as would be necessary in accordance with the draft Bill – see clause 421). Slater and Gordon further notes that the Law Reform Commission of WA has recommended, "*that the 'once and for all' rule be modified in Western Australia through the introduction of a provisional damages regime.*"[13] In the event that a provisional damages regime is introduced in Western Australia, it is important that a worker is able to go before a Dust Disease Medical Panel more than once, if they are diagnosed with multiple successive dust diseases. Slater and Gordon seeks strong assurances that clause 115 of the draft Bill will not operate to limit a worker's ability to go before a Dust Disease Medical Panel more than once, where necessary.
Draft Bill clause 120:	As stated above, Slater and Gordon submits that sub clause 114(b) of the draft Bill be amended to "*the day that a Dust Disease Medical Panel makes its determination*". Accordingly, we submit that sub clause 120 (b) should be deleted.
Draft Bill clause 122	Slater and Gordon supports clause 112(1) of the draft Bill as it is important that a Dust Disease Medical Panel acts "*speedily and informally, and in accordance with good conscience*". Under the current Industrial Diseases Medical Panel ('IDMP') system, there has been the need for an IDMP to be convened

[12] See Requena-Mullor, M.; Alarcón-Rodríguez, R.; Parrón-Carreño, T.; Martínez-López, J.J.; Lozano-Paniagua, D.; Hernández, A.F. Association between Crystalline Silica Dust Exposure and Silicosis Development in Artificial Stone Workers. Int. J. Environ. Res. Public Health 2021, 18, 5625. Found at < https://doi.org/10.3390/ijerph18115625>

[13] Law Reform Commission of WA, *Provisional Damages and Damages for Gratuitous Services: Final Report Project 106*, June 2016 at pg 2.

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	on an extremely urgent basis (i.e. within hours of an application being made in the instance of an asbestos disease sufferer on their deathbed) and determinations made in the absence of all the "required" medical documentation. Given the speed at which a Dust Disease Medical Panel would need to be constituted (and make determinations) Slater and Gordon does not support sub clause 112(4) of the draft Bill as it may unduly delay the ability of a Dust Disease Medical Panel to make a determination in the case of a terminally ill dust disease sufferer with a limited life expectancy prognosis. In the circumstances, Slater and Gordon submits that *"must*" be amended to *"may"* to allow for greater flexibility in the practice and procedure adopted by a Dust Disease Medical Panel.
Draft Bill clause 126	Referring to submissions made above in respect to clause 115 of the draft Bill, Slater and Gordon seeks clarification regarding the operation of clause 126 of the draft Bill and seeks assurances that this clause does not in any way limit a worker's ability to go before a Dust Disease Medical Panel for multiple successive dust diseases in order to access their common law entitlements. In this instance, clarification is required as to whether an application must be made to "*vary or rescind or remake*" a determination by the Panel, in the event of a worsening asbestos related disease (ie disease progression) or in the event that another asbestos related disease is diagnosed, or if an application for a fresh Panel determination is required. Slater and Gordon seeks assurances that clause 126 of the draft Bill will not operate to limit a person's ability to go before the Dust Diseases Medical Panel more than once, where necessary.
Draft Bill clause 270	Slater and Gordon supports clause 270 of the draft Bill. However, sub clause 270(4)(c) should be amended in these terms: a reference to the due date for payment of damages is a reference to the date payment is due under the judgment *or agreement*.
Draft Bill clause 416	Slater and Gordon refers to submissions made below in respect to clause 421 of the draft Bill. Absent any express provision in the draft Bill removing the requirement for terminally ill asbestos disease sufferers to elect to retain the right to seek damages, Slater and Gordon submits that sub clause 416 (a) of the draft Bill be amended in these terms: "an award of damages in respect of an injury that results in, *or is likely to result in*, the death of a worker;"
Draft Bill clause 421	Slater and Gordon understands that clause 421 of the draft Bill means that a writ cannot be issued, or settlement of the common law claim effected, without the impairment assessment and election being registered. Slater and Gordon submits that the provisions in the draft Bill requiring asbestos disease sufferers (specifically those suffering from mesothelioma or where the worker's death is imminent) to make an election to retain the right to seek common law damages are, in practice, unduly onerous. The requirement to make an election to "retain the right to seek common law damages" does not make sense given, in practice, asbestos disease sufferers typically do not have an entitlement to receive

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	weekly payments. The average age of mesothelioma sufferers at diagnosis is 75[14] and therefore most asbestos disease sufferers who have been exposed to asbestos during their employment are retired. Further, given mesothelioma sufferers will be automatically assessed as having a WPI of 25% by operation of sub clause 425 (7) of the draft Bill (and in current practice are always assessed as having a WPI of 100% by an Industrial Diseases Medical Panel under the current Act), there is no practical reason why a mesothelioma sufferer must go before a Dust Disease Medical Panel to meet the threshold criteria, stated as "at least 15%". Therefore, Slater and Gordon submits that where a worker is terminally ill and is suffering from an asbestos disease, the requirement to make an election to retain the right to seek common law damages be removed. This position is consistent with previous submissions made by Slater and Gordon in response to the Discussion Paper released by WorkCover WA in October 2013. WorkCover WA released its Final Report[15] in June 2014. Relevantly, the Final Report concluded: *"While the termination day does not apply it is important to retain the election requirement for asbestos diseases. The election signals the intention to pursue common law and is a key procedural step in commencing proceedings for all injuries. An election also impacts on the ongoing right to compensation even if most workers with asbestos diseases would not be receiving weekly payments.* *An election is a simple process which requires the filing of a form and attachment of an ADMP panel assessment or agreement indicating the level of WPI is greater than 15%".*[16] Slater and Gordon respectfully disagrees with the statement that "*an election is a simple process*" in the context of a worker dying of mesothelioma and in the late stages of their terminal illness. In practice, it is not unusual for a need to arise to issue a Writ on an urgent basis (including whilst the sufferer is terminally ill in hospital) in order to protect a worker's common law entitlements. Further, it is important to commence and progress a mesothelioma sufferer's common law claim as soon as possible in order attempt to progress their claim to resolution in their lifetime. Mesothelioma common law claims are admitted to and managed through the Commercial and Managed Cases (CMC) list of the Supreme Court of WA in recognition of the need to deal with claims on an expedited basis. In order to assist a mesothelioma sufferer who has been exposed to asbestos during the course of their employment, the following steps are ordinarily required prior to a common law claim commencing: 1) Obtain a full occupational history and exposure history from the worker; 2) Obtain a signed authority from the worker to access medical records; 3) Make requests pursuant to the *Freedom of Information Act* to hospital and/or medical providers to gain access to pathology and/or respiratory physician's report confirming diagnosis; 4) Wait for receipt of medical records confirming diagnosis (this can take upwards of many weeks and in some circumstances months);

[14] Australian Institute of Health and Welfare 2021. *Mesothelioma in Australia 2020*. Cat. no. CAN 143. Canberra: AIHW. Found at < https://www.aihw.gov.au/reports/cancer/mesothelioma-in-australia-2020/data >
[15] WorkCover WA, *Review of the Workers' Compensation and Injury Management Act 1981: Final Report*, June 2014 (Final Report).
[16] Final Report at 413 – 414.

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	5) Make an application to an Industrial Diseases Medical Panel ('IDMP') requiring the worker to complete and sign an additional form; 6) Await an IDMP to be convened and determination from the IDMP to be made; 7) Make an election (including deciding as to whom the election should be made against in circumstances where there are multiple employers). This is currently done by filing a Form 34: Election to Retain Right to Seek Damages; 8) Await notification from the Director of WorkCover WA of registration of the election; 9) File a Writ of Summons in the Supreme Court of Western Australia It is assumed that the above process will be essentially be the same under clause 421 of the draft Bill. In certain circumstances, making an application to an Industrial Diseases Medical Panel can be relatively quick and straight forward. This is especially the case in instances where diagnosis is clear, a worker is in receipt of their medical records and their exposure history is known and non-complex. However, there are many instances where a worker's ability to make an application to go before an Industrial Diseases Medical may be significantly delayed. Examples of where a mesothelioma sufferer's ability to make an application to go before an Industrial Diseases Medical Panel may be delayed include: • Where a worker is not in possession of medical records confirming diagnosis (including cytology and histopathology reports which is often the case); • Where a worker has been diagnosed with mesothelioma based on clinical and radiological findings and no pathology exists confirming diagnosis. • Where a worker lives in a regional area where obtaining medical records can sometimes be delayed; • Where a worker does not have access to email or digital communication, requiring all documentation to be sent and received via ordinary mail; • Where a worker is an inpatient at hospital and the hospital is unwilling to release medical records whilst that person is admitted to a ward; • Where a worker is in the end stage of their disease and receives confirmation of diagnosis on a public holiday or extended holiday period. It is not uncommon for Slater and Gordon to take initial instructions from mesothelioma sufferers over the Easter or Christmas public holidays. It is critically important that a Writ be issued in person's lifetime in order to preserve their common law entitlements. Prior to the passage of legislation on 13 March 2002[17] (which commenced 21 March 2002) (the survivorship legislation), the pressure to expedite and resolve common law claims within an asbestos victim's lifetime was particularly stressful for terminally ill plaintiffs and their families. Prior to the enactment of the survivorship legislation, an asbestos-disease sufferer's claim for non-pecuniary losses (general damages and damages for loss of expectation of life) did not survive their

[17] *Law Reform (Miscellaneous Provisions (Asbestos Disease Act))* 2002 (WA)

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	death. Not only was it crucial for proceedings to be issued in the plaintiff's lifetime, it was also necessary for the claim to be resolved in the plaintiff's lifetime. Claims by some of the first sufferers of mesothelioma were defeated, primarily by the "race against time". Since the enactment of the survivorship legislation, in the event that an asbestos disease sufferer commences an action but does not survive to trial and judgement (or settlement), a claim for pain and suffering (i.e. general damages) and for the curtailment of expectation of life remains claimable by the estate[18]. However, the requirement for a mesothelioma sufferer to make an election under the current Act and the draft Bill adds an additional hurdle prior to a Writ being issued. Therefore, Slater and Gordon submits that the provisions in the draft Bill requiring dust disease sufferers (specifically those suffering from mesothelioma or where the worker's death is imminent) to make an election to retain the right to seek common law damages be removed. Slater and Gordon submits that an express exemption should apply or alternatively submit that the above amendment to sub clause 416 (a) be made.

[18] Section 4 (2a)(c) of *Law Reform (Miscellaneous Provisions) Act* 1941 (WA)